No. 20380

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United States
COURT OF APPEALS
for the Ninth Circuit

KATHRYN TASHIRE, EVA SMITH, HARRY SMITH, LILLIAN G. FISHER, BARBARA McGALLIAND, DORIS ROGERS, GAIL R. GREGG, RICHARD L. WALTON, heir of SUE M. WALTON, and DONALD WOOD,

Appellants,

v.

STATE FARM FIRE AND CASUALTY COMPANY, and GREYHOUND LINES, INC.,

Appellees.

APPELLANTS' REPLY BRIEF

Interlocutory Appeal from Order Denying Motion to Dissolve Restraining Order of the United States District Court for the District of Oregon

HONORABLE WILLIAM G. EAST, Judge

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INTRODUCTION

The briefs heretofore filed by the parties include Statement of Jurisdiction, Statement of the Case and Specification of Errors. Appellee State Farm Fire and Casualty Company, hereinafter referred to as "State Farm," adopted appellants' Statement of Jurisdiction and Statement of the Case. Greyhound Lines, Inc., hereinafter referred to as "Greyhound," included in its brief an additional statement of jurisdiction and a supplemental statement of the case. It is unnecessary to make

any comments regarding these portions of any of the briefs.

Appellants will set forth the specifications of error as they appeared in their original brief.

ARGUMENT

A. Interpleader is an in personam proceeding.

1. State Farm, at page 6 of its brief, states that appellants' position that interpleader is an *in personam* proceeding need not be argued. State Farm then attempts to convert appellants' argument to indicate it is appellants' position that personal service of the various defendants is essential to jurisdiction. The question is not whether the delivery of the complaint and restraining order by registered mail to the Canadian residents is sufficient service of process. It is appellants' position that the United States District Court does not have jurisdictional power, regardless of the method of service, to render an effective restraining order as against residents of Canada. It is appellants' position that the Canadian residents are necessary parties, and the inability to bring them before the Court renders the entire proceeding invalid.

Greyhound, in its brief, at page 17, refers to appellants' position as one of complaint of some procedural defect which would merely require that the method of service be corrected and perfected. This attempted restatement of appellants' position by Greyhound is a misinterpretation of appellants' basis for this appeal.

On page 13 of Greyhound's brief, it is stated that "* * * it has repeatedly been held that an indebtedness in the form of a fund is a sufficient *res* to support jurisdiction under § 1655 * * *."

To test this statement, one must decide whether State Farm's deposit with the Clerk of the Court is a "fund." In appellants' brief, the case of *Aetna Life Insurance Company* v. *DuRoure,* 123 F. Supp. 736, was cited. Appellants did not include the quotation from page 740. It completely answers Greyhound's argument. This quotation follows a discussion of the *New York Life Insurance Company* v. *Dunlevy* decision (1916), 241 U.S. 518, 36 S. Ct. 613, 60 L. Ed. 1140. The quotation was from 3 Moore's Federal Practice (2d ed.), ¶ 22.06, as follows:

> " 'While a court may obtain in rem or quasi in rem jurisdiction over adverse claimants to a specific res, such as the corpus of a trust estate, a fund, securities, or other chattels, a person against whom in personam liability is asserted may not transform that liability into a res by depositing money into court and thus enable the court to proceed to an adjudication, by in rem or quasi in rem process, of the defendants' in personam claims against the plaintiff. This was the teaching of the Dunlevy case.'
>
> "See also Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 566."

Greyhound further states that its position is supported by "repeated" decisions, then cites two cases: *Republic of China* v. *American Exp. Co.,* (D.C. S.D. N.Y. 1951), 95 F. Supp. 740 at 743-744, aff'd (C.A. 2

1952), 195 F.2d 230, opinion on remand (D.C. S.D. N.Y. 1952), 108 F. Supp. 169. *A/S Krediit Pank* v. *Chase Manhattan Bank* (D.C. S.D. N.Y. 1957), 155 F. Supp. 30, aff'd (C.A. 2 1962), 303 F.2d 648.

Note that Greyhound's interpretation of the *Republic of China* case refers to it as a claim against a bank account. The *Republic of China* case involves three decisions, the first appearing in 95 F. Supp. 740, the second in 195 F.2d 230, and the last in 108 F. Supp. 169. The decision states, at 95 F. Supp., page 742, that the fund originated from the establishment of a credit balance with the American Express Company. The entire issue in the first decision was whether the circumstances of the case were such that an interpleader would probably lie, and the District Court held that it would. The decision of the court went no further. This opinion was appealed to the Circuit Court of Appeals for the Second Circuit, and the decision holding that the interpleader was proper was affirmed. The matter was then remanded to the District Court for further proceedings. The next opinion is reported in 108 F. Supp. 169, and at this stage, the Court ordered that the matter be remanded to the Calendar Commissioner, and was not to be restored for trial until there was proof of jurisdiction over all defendants directed to be brought in by the judgment of interpleader. These defendants included a John Doe and a Richard Roe and a foreign government. The Court held, at page 170, that there was no showing of proper service, this being the reason the cause was held in abeyance.

It is submitted that this is hardly valid authority

for Greyhound's proposition that indebtedness in the form of a fund is a sufficient *res* to support jurisdiction under 28 U.S.C.A. § 1655.

In the *A/S Krediit Pank* case, 155 F. Supp. 30, the "fund" consisted of cash on deposit and securities. The Court, at page 36, authorized service pursuant to 28 U.S.C.A. § 1655, and felt that this method of service would be proper because

> "* * * the securities now held by Chase for this account plainly constitute personal property within the district to which a claim has been asserted."

It is submitted that the *A/S Krediit Pank* case is not support for appellee's position, and most assuredly does not provide bases for this Court to overlook the *Dunlevy* decision and the quotation from Moore's Federal Practice, set forth above.

B. Service by registered mail upon Canadian residents pursuant to Rule 4 (i) was not valid.

Appellants have discussed their position on pages 8-13, inclusive, of their original brief. State Farm, on page 8 of its brief, indicates that such use of Rule 4 (i), F.R.C.P., has been challenged and upheld. State Farm relies on *Hoffman Motors Corp.* v. *Alfa Romeo,* 244 F. Supp. 70 (1965) and *Securities & Exchange Commission* v. *Briggs,* 234 F. Supp. 618 (1964). The *Hoffman Motors* case, at page 77, at the beginning of headnotes 9 and 10, states as follows:

> "[9, 10] The Automobile Dealers Act (15 U.S.C. §§ 1221-1225) contains no special provision for service of process."

Accordingly, the court permitted service upon an Italian corporation pursuant to the New York statute providing for service upon a "nondomiciliary" who "transacts any business within the state." The other act involved was the Robinson Patman Act, which contained a special provision concerning service of process (15 U.S.C. § 22), providing that process may be served "in the District of which (defendant corporation) is an inhabitant, or wherever it may be found."

In the first situation, Rule 4 (i) was brought into play because the statute was silent as to service. In the second situation, the statute provided for the method of service and was followed. Despite State Farm's interpretation of the *Hoffman Motors* decision, examination will indicate that it does not support its position. At page 78, the Court makes the following comment (The initials S.p.A. refer to the Italian corporation):

> "S.p.A. does not dispute that it was properly served under the New York statute, if that statute applies. It takes the position, however, (1) that Rule 4(f), F.R.C.P., limits service to New York State and therefore extraterritorial service is invalid, and (2) assuming the applicability of state law, that it did not transact business within the state as required by § 302(a), C.P.L.R., and therefore could not be served in Italy under it. Both contentions are without merit."

In *Securities & Exchange Commission* v. *Briggs,* 234 F. Supp. 618, service was made upon an American citizen in Canada, the question being whether the Court had power to take *in personam* jurisdiction over one of its

citizens not physically present within the United States when served with process. The service was made under 15 U.S.C. § 77 v (a), stating:

> " '* * * process in such cases may be served in any other district of which the defendant is an inhabitant *or wherever the defendant may be found.*' (77v(a)) (Emphasis added.)"

Greyhound, at page 15 of its brief, argues that Rule 4 (i) provides an alternate mode of service to that provided in 28 U.S.C.A. § 2361. Also, at page 17 of its brief, Greyhound makes reference to ORS 15.110 and 15.130. The reference to the Oregon statutes is most misleading, as the adoption of Rule 4 (i) was to permit the use of state "long-arm" and nonresident motorist statutes in federal court, and the Oregon sections referred to have to do with cases where the Court has jurisdiction of the subject matter of the action (ORS 15.110) and in suits in equity when the subject of the suit is real or personal property in the State of Oregon, or is for divorce, etc. (ORS 15.130).

It is appellants' position that Rule 4 (i) does not provide an alternative or an additional mode of service; the provisions of 28 U.S.C.A. § 2361 control the method of serving process on all parties in this cause.

C. The Court did not have jurisdiction over the Canadian defendants, and the motion to dissolve the restraining order and to dismiss the complaint should have been granted.

(a) Many of the cases referred to by defendant State Farm, on page 6 of its brief, in opposition to appellants'

position, have already been discussed under Assignment of Error No. 1. Appellee Greyhound interprets appellants' position to be that Section 2361 prohibits service outside of the United States (Greyhound's Br., p. 9).

The issue here has nothing to do with statutory prohibitions regarding service, but rather that there is no provsion for such service. Service outside the United States, however, accomplished, does not give the Court jurisdiction in this cause. It is the responsibility of the plaintiff bringing this or any other proceeding in Federal Court to establish jurisdiction, and this has not been done.

Greyhound, at page 10 of its brief, makes reference to *United States* v. *Cardillo,* (D.C. W.D. Pa. 1955) 135 F. Supp. 798. Service was made in this denaturalization proceeding by means of registered mail and publication, in which latter instance the proper address of respondent was not set forth. The Court found that the publication was defective, but the defect was cured by the registered notice. In that case, respondent was relying upon a technical defect, and to avoid its effect, the Court adopted a liberal construction of the notice portion of the statute. Appellants are not here complaining of a technical defect; appellants assert that 28 U.S.C.A. § 2361 does not require any interpretation or construction, but requires service within the United States.

CONCLUSION

Appellee Greyhound, at page 17 of its brief, contends that even if it be found that the United States District Court for the District of Oregon did not have interpleader jurisdiction over the Canadian residents, this action should not be dismissed, and the State Farm and Greyhound should be permitted to retain the restraining order and maintain the cause under the Interpleader Act. In taking this position, the appellees overlook the basic right of these appellants to bring and maintain actions for their injuries and for deaths, in any forum which they may choose. The convenience of these appellees and their supposed "critical need for interpleader relief" (Greyhound's Br., p. 6) are not matters which should control the holding in this cause.

The sole issue is whether this proceeding can properly be brought and maintained under the Interpleader statute, or under 28 U.S.C.A. § 1335, and appellants submit that for the reasons contained herein, the order of the lower court should be reversed, and the restraining order dissolved, and the complaint dismissed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellants.